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JAMES H. MCKENNEY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No. 944

IN

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN

UNITED STATES REPAIR & GUARANTY COMPANY,

vs.

ASSYRIAN ASPHALT COMPANY,

MOTION, AFFIDAVIT IN SUPPORT THEREOF, PETITION, AND BOND FOR COSTS.

ERNEST WILKINSON,
Petitioner.

LYSANDER HILL,
WILLIAM R. OMOHUNDRO,
Of Counsel.

The Gunthrop-Warren Printing Company, 29 Jackson St., Chicago.

IN THE

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RE

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN

UNITED STATES REPAIR & GUARANTY COMPANY,

vs.

ASSYRIAN ASPHALT COMPANY,

PETITION.

TO THE SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your petitioner, United States Repair and Guaranty Company, a corporation organized and doing business under and by virtue of the laws of the State of Illinois, respectfully shows to this Honorable Court as follows:

First. That your petioner is, by due assignments duly recorded in the Patent Office of the United States, the sole and exclusive owner of all the right, title and interest in, to and under the following named patents of the United States, to wit:

Patent No. 501,537, granted to Amos H. Perkins, as-

signor to your petitioner, granted and dated July 18, 1893, and

Patent No. 560,599, granted to Amos H. Perkins, assignor to your petitioner, granted and dated May 19, 1896.

The former being for a method of repairing asphalt pavements, and

The latter being for an apparatus for repairing asphalt pavements.

Second, your petitioner, in conjunction with one of its licensees, to wit, The Barber Asphalt Paving Company, brought suit in the United States Circuit Court for the Northern District of New York againt Standard Paving Company under said letters patent No. 501,537 upon a method of repairing asphalt pavements, which cause did not involve and did not in any manner relate to said patent No. 560,599 upon an apparatus.

Third. That said cause, in the last preceding paragraph hereof referred to, proceeded to a final hearing upon full proofs, briefs and arguments before his Honor Judge Coxe, holding said Circuit Court for the Northern District of New York, and therein an opinion was handed down (87 Fed., 339), and a decree was entered finding said letters patent No. 501,537 to be invalid, and dismissing said bill for want of equity.

Fourth. That, upon an interlocutory appeal in the cause in the last preceding paragraph referred to, which was heard before Wallace, Lacombe and Shipman, circuit judges, the unanimous opinion of said court by Shipman, C. J. (95 Fed., 137), was handed down, to wit, May 25, 1899, by and pursuant to which the patent aforesaid, No. 501,537, was held valid, but was found

not to have been infringed by the defendant in that cause.

Fifth. That your petitioner further represents that it, to-wit, June 11, 1897, filed its bill of complaint against the said defendant, Assyrian Asphalt Company, declaring, *inter alia*, upon said Letters Patent No. 501,537; that said case proceeded to a final hearing upon the full and complete record now filed in this court from the Court of Appeals for said seventh circuit; that therein an opinion was handed down by the Circuit Court, finding the said Method patent, No. 501,537, to be invalid and void, and dismissing so much of said bill of complaint as declared upon said patent No. 501,537 for want of equity; and that an appeal from that part of the decree just above referred to was duly prayed and perfected in the Court of Appeals for the seventh circuit, no appeal being taken by the defendant as to the remaining parts of the decree at circuit.

Sixth. That said last-mentioned cause was heard on the record now presented to this court upon full briefs and oral arguments on both sides by said Court of appeals for the seventh circuit at its present term, to-wit, its October term, 1899, and therein, to-wit, April 16, 1900, the unanimous opinion of said court by Woods, C. J., was handed down holding said patent No. 501,537 invalid and void. A copy of the statement of the case by his Honor Judge Woods, together with a copy of the opinion of the court on said appeal, forms a part of the transcript of the proceedings in said court herewith submitted.

Seventh. That the action of the Circuit Court of Appeals for the Second Circuit and the action of the Circuit Court of Appeals for the Seventh Circuit, as above set

forth, are at variance and in direct conflict, the Circuit Court of Appeals for the Second Circuit holding the method patent valid but finding that it had not been infringed by the defendant in that cause, and the Circuit Court of Appeals for the Seventh Circuit, upon substantially the same evidence, finding that said method patent was invalid and void and directing the bill to be dismissed as to that patent, thereby, in effect, rendering said patent valid for the Second Circuit and invalid for the Seventh Circuit.

Eighth. Your petitioner further shows unto your Honors that a comparison of the opinion of the Circuit Court of Appeals for the Second Circuit (reported in 95 Fed., 137), with the opinion of the Circuit Court of Appeals for the Seventh Circuit in the case at bar, will show that said courts placed varying and conflicting constructions upon the claim of said patent, the Circuit Court of Appeals for the Second Circuit holding the claim proper for the invention described in the specification, and the Circuit Court of Appeals for the Seventh Circuit holding that said claim is improper and does not describe the invention set forth in the specification.

Ninth. Your petitioner further respectfully represent that the matter now presented does not only relate to the complainant's rights and contentions, but involves also matters of grave public interest, in support of which your petitioner further, under oath, represents as follows, to wit:

The record now presented to this court shows the following uncontested facts:

(a) The complainant, your petitioner, has a large number of licenses outstanding under said Method patent No. 501,537 (with incidental licenses to use apparatuses for carrying out said method.)

(*b*) Each and all of said licenses have been asked for and granted per force of the recognized validity of said Method patent No. 501, 507.

(*c*) Many municipalities, covering all sections of this country, have recognized the novelty and the usefulness of said Method patent by, in their specifications for work to be done, requiring that said method should be employed or by making a difference of about fifty cents ~~per~~ per square yard in the bids made and accepted for repairs of asphalt pavements throughout the country in favor of the said "Perkins Method;" that is to say, that, in the specifications and contracts so entered into by the municipalities of the country, a difference is specified by the municipal officers and acquiesced in by the contractors, which amounts to about fifty cents a square yard of repair in favor of said Perkins Method.

(*d*) The Barber Asphalt Paving Company, which for years contested both the novelty and usefulness and even the practicability of the method disclosed in said patent No. 501, 537, after, per force of the circumstances above pleaded, having taken a license, testified that during three years a saving therefrom resulted to them of $442,500.

Tenth. Your petitioner thus shows that the matter involved is not only a question of a divergence and confusion of opinions and decisions contrary to the rules of construction of United States Letters Patent for inventions laid down by this court, but also that such municipalities containing asphalt pavements, and each contractor in the United States interested, directly or indirectly, in the repairs which are necessary to be made to asphalt pavements, are directly interested in the issue now presented for review.

WHEREUPON, YOUR PETITIONER RESPECTFULLY PRAYS:

First. That, in accordance with the motion herewith presented, the printed copies of the record in said Court of Appeals for the Seventh Circuit may be accepted and considered in connection with this petition; and

Second. That a writ of *certiorari* may issue to the United States Court of Appeals for the Seventh Judicial Circuit, directing that said case No. 633 therein pending between United States Repair and Guaranty Company and Assyrian Asphalt Company shall be certified to this honarable court for its review and determination.

UNITED STATES REPAIR AND GUARANTY COMPANY,
V. W. FOSTER,
President.

ERNEST WILKINON,
Solicitor for Petitioner.

LYSANDER HILL,
WILLIAM R. OMOHUNDRO,
Of Counsel.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

V. W. Foster, being first duly sworn, deposes and says that he is the president of United States Repair and Guaranty Company, the petitioner; that he has read the above petition for a writ of *certiorari* to the Circuit Court of Appeals for the Seventh Circuit, and that every statement of fact therein contained is true within his own knowledge.

V. W. FOSTER.

Subscribed and sworn to before me this 10th doy of May, A. D. 1900.

[NOTARIAL SEAL.]

M. E. SHIELDS,
Notary Public in and for the county in the state aforesaid.

IN THE
SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

United States Repair & Guaranty Company
vs.
Assyrian Asphalt Company *et al.*

APPEARANCE.

I hereby enter my appearance, as solicitor and of counsel for the petitioner in the above-entitled matter.

ERNEST WILKINSON.

Washington, D. C., 12th May, 1900.

IN THE
SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

United States Repair & Guaranty Company
vs.
Assyrian Asphalt Company *et al.*

MOTION.

And now comes the United States Repair & Guaranty Company, said petitioner, by its solicitor, Ernest Wilkinson, and presents to the court a full, true, correct and complete copy of the record in this cause presented to, considered and determined by the United States Court of Appeals for the Seventh Circuit, together with eleven duplicate copies thereof, and moves this court that the same may be accepted as a full exemplification of the record which the petitioner now prays, pursuant to a writ of certiorari, may be reviewed.

And this motion is based upon the affidavit of W. R. Omohundro and upon the pronouncement of this court by the Chief Justice as to such procedure in cases No. 500 and No. 501, decided January 29, 1900, of the present October term, 1899, of this court.

ERNEST WILKINSON.

Washington, D. C., 12th May, 1900.

IN THE
SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

United States Repair and Guaranty Company
vs.
Assyrian Asphalt Company *et al.*

STATE OF ILLINOIS, } ss.
COUNTY OF COOK. }

AFFIDAVIT OF W. R. OMOHUNDRO.

W. R. Omohundro, being first duly sworn, deposes and says that he is of counsel for the petitioner; that in said suit of the United States Repair and Guaranty Company *v.* Assyrian Asphalt Company *et al.* he has been, since the commencement of said suit in the United States Circuit Court for the Northern District of Illinois, until now, one of the solicitors and of counsel for the complainant.

That the printed copy hereto annexed of the record of said cause was prepared and printed under the personal supervision of the clerk of the said Court of Appeals, and is a true, full, correct and complete record in said cause, as presented to, considered and determined by said Court of Appeals, and that the said printed copy hereto attached has been furnished to this affiant by the clerk of said court for use under this affidavit and under the motion now made for its use in the present proceedings praying for the issuance of a writ of certiorari; and further affiant saith not.

W. R. OMOHUNDRO.

Subscribed and sworn to before me, a notary public in and for the County of Cook, in the state aforesaid, this 9th day of May, A. D. 1900.

M. E. SHIELDS,
Notary Public in and for the County in the State aforesaid.

[NOTARIAL SEAL.]

In The
SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE PETITION OF THE UNITED STATES REPAIR AND GUARANTY COMPANY FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT FOR A REVIEW OF THE DECISION OF THAT COURT IN THE CASE LATELY DETERMINED THEREIN, IN WHICH THIS PETITIONER WAS COMPLAINANT AND THE ASSYRIAN ASPHALT COMPANY WAS DEFENDANT.

KNOW ALL MEN BY THESE PRESENTS:

That the said United States Repair and Guaranty Company and its successor and assigns, as principal, and V. W. Foster, of Chicago, Illinois, as surety, are hereby held and firmly bound, in consideration of the premises, to James H. McKinney, clerk, etc., and to his successor in office, for any and all costs and fees which may be adjudged to be paid by this petitioner

UNITED STATES REPAIR AND GUARANTY COMPANY,
By V. W. FOSTER, *President.*
V. W. FOSTER.

Chicago, Illinois, May 9th, 1900.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

No.

RE

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SEVENTH CIRCUIT

IN

UNITED STATES REPAIR & GUARANTY COMPANY

vs.

ASSYRIAN ASPHALT COMPANY,

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

We respectfully submit:

First. That the verified petition and the record filed comply, as to matters of law, of fact, and of practice, with all of the proceedings in this court in patent causes, in which the writ of *certiorari* has been granted.

Second. That the questions thus presented to this court by the record and by the petition are:

I.

A manifest divergence and confusion of opinion and decision between the United States Circuit Courts of Appeal for the Second and for the Seventh Circuits.

II.

That said divergence and confusion of opinion concern questions of law relating to the proper construction to be put upon claims of letters patent for invention, and the relation thereto of the specifications and drawings of such letters patent.

III.

That the questions thus presented under the divergence and confusion of opinion and decision recited, relate especially to the proper legal construction of claim 1 of the Method patent, No. 501,537, so granted upon the invention of Amos H. Perkins.

IV.

That by the decisions of the said United States Courts of Appeal, for both the Second and the Seventh Circuits, the fact of an invention by said Perkins has been fully recognized, but the technical legal construction of said claim 1 of said patent No. 501,537 still remains undetermined, by virtue of the divergence and confusion of opinion and decision in said courts of appeal for the Second and Seventh Circuits.

BRIEF.

Appending hereto for the convenience of the court a copy of the opinion and decision by the Court of Appeals for the Second Circuit, and referring for the opinion of the Court of Appeals for the Seventh Circuit to page 12 of the transcript from the latter court, we make the following quotation from the two opinions to substantiate each of the four propositions hereinabove made:

From the Second Circuit:

> "Nevertheless, there is, in fact, a difference in "the material of the two pavements, *and we are in-* "*clined to differ from the Circuit Court, and to re-* "*gard the Perkins patent as patentable*, because it "was an application of an old process of intense "heating, by means of a movable furnace, to differs "ent and dissimilar materials. The two processes "were not exactly alike. Crochet treated the sur- "face by vivid heat, removed the damaged part, "roughened the remaining surface, and added new "material. Perkins heated in the same way, re- "duced the old material to a soft, pliable state, "agitated it with a rake, and mixed it with enough "new material to fill up the spot to be repaired. "*No other anticipation of importance was presented* "*in the record.*"

From the Seventh Circuit:

> "The contention of the appellant has been nar- "rowed by the counsel and by the experts to the as- "sertion that the Perkins 'method is characterized "'by a new and useful way of applying heat to the "'pavement, to wit, by sending a flame-blast into

"'direct contact with the surface' This, it is in-
"sisted, must follow from an intelligent reading of
"the claim, in connection with the specification.
"The specification, instead of aiding, explicitly
"and absolutely forbids the proposition.

* * * * *

"*The well-chosen words of the first claim are in*
"*strict harmony with the unmistakble purpose of*
"*the patentee*, and include in his method *all* of the
"'various ways' possible of heating the surface to
"be affected and the operation of every known form
"of apparatus, capable of being used *in any way to*
"the accomplishment of the proposed end."

* * * * *

"Treating the invention as being simply for the
"method of applying heat, we incline to the opinion
"of one of the experts that the method itself was
"separately patentable.

* * * * *

"While if has been determined and stands un-
"questioned in the case that Perkins invented an
"improved and much more efficient apparatus for
"repairing asphalt pavement than any before
"known, and, incidentally, developed—invented—
"a new and useful method of applying the heat,
"*yet, neither by itself nor in connection with the*
"*other steps mentioned in the claim, is that method*
"*covered by the patent.*"

The italics are ours.

We respectfully submit that as a result of this divergence and confusion of opinion and decision, not only the owners of, and licensees under, the said patent, but the contractors and the municipalities all over the country, are

left in doubt as to the standing of this patent, which is now held to be a valid patent in the Second Circuit and an invalid patent in the Seventh Circuit, while in the remaining circuits its validity is in doubt, and from which state of affairs only confusion and litigation can result. Hence we urge that a decision of this court is necessary to finally determine the status of this patent.

We therefore respectfully submit that the writ of *certiorari* in this case should be immediately issued.

Respectfully submitted.

ERNEST WILKINSON,
Solicitor for Petitioner.

LYSANDER HILL,
WILLIAM R. OMOHUNDRO,
Of Counsel.

OPINION OF COURT OF APPEALS, SECOND CIRCUIT.

"Appeal from the Circuit Court of the United States "for the Northern District of New York.

"Letters patent No. 501,537, dated July 18, 1893, "were issued to Amos H. Perkins, assignor to the West- "ern Paving & Supply Company, for an improved "method of repairing asphalt pavements. The patent "was subsequently assigned to the United States Repair "& Guaranty Company, which gave an exclusive license "to the co-complainant, the Barber Asphalt Paving Com- "pany. A bill in equity brought in the circuit court for "the Northern district of New York (87 Fed., 339), "which charged the defendant with an infringement of "their patent, was dismissed upon the ground of the an- "ticipation of the patented process by a French patent, "No. 137,208, granted to Paul Crochet and others on "June 11, 1880.

"Edwin H. Brown, for appellants.

"Tracy C. Becker, for appellee.

"Before WALLACE, LACOMBE and SHIPMAN, Circuit "Judges.

"SHIPMAN, Circuit Judge. The old mode of repairing "asphalt pavements was to dig out with a pick 'the sur- "face material around the spot to be repaired, sometimes "applying heat to the spot to soften the material so that "it could be more easily removed.' After the material "was removed, the hole was cleaned and coated with tar. "The new material, which was placed in the hole in a "heated state, was ironed and smoothed in the usual "manner. This system is said to have been defective, be- "cause a thorough union or commingling was not made "between the old and new material, and was expensive, "because the old material, which was torn away by the "pick, must be discarded. The patented method subjected "'the spot to be repaired and the surrounding edges to "such a degree of heat that the surface asphalt, not only "the exact spot to be repaired, but the surrounding por-

" tion to a greater or less degree, is reduced to the soft, pli-
" able state in which it was originally laid. With a rake
" or other suitable instrument, it is then agitated and
" mixed with enough new material to fill up the spot to
" be repaired. It is then subjected to the usual finishing
" operation of ironing and burnishing.' There is no
" soldering and no dividing line between the new and the
" old, 'because the new material has been mixed with,
" and becomes a part of, the old material.' The appara-
" tus for the application of heat which is described in the
" patent is a portable gasoline tank, with burners under-
" neath, which throw a sudden strong blast of heat upon
" the spot to be repaired. The flame, it is said, creates a
" thin burned skin or crust upon the surface of the as-
" phalt, and melts or liquifies the particles underneath so
" that they do not lose their cohesive character, but can
" be used again, after being suitably stirred and mixed
" with new material. The claims of the patent are as
" follows:

" ' (1) The method of repairing asphalt pavements,
" ' which consists in subjecting the spot to be repaired to
" ' heat, adding new material, and smoothing and bur-
" ' nishing it, substantially as described. (2) The method
" ' of repairing asphalt pavements which consists in sub-
" ' jecting the spot to be repaired to heat until the ma-
" ' terial is softened, agitating it, and mixing with it new
" ' material, and finally smoothing and burnishing it,
" ' substantially as described.'

" The Crochet Patent, which was for a method of re-
" pairing the French pavements of rock asphalt, and
" which used the intense heat of the patent in suit,
" seemed to the circuit court an anticipation. Crochet
" heated the part to be repaired, by a movable furnace,
" until the surface became friable. The upper and dam-
" aged part of the layer was removed by a toothed iron
" hoe, which performed the function of a rake, and rough-
" ened the part not removed. A suitable thickness
" of asphalt in powder was then spread over the
" depression, and tamped in the ordinary way. From
" the similarity of the two patents, it seemed well-
" nigh manifest that the French patent had been read
" by the patentee, who was urged by the first assignee of

"the patent in suit to invent an economical method of "repairing asphalt pavements. It is, however, important, "upon the question of anticipation, to appreciate the fact "that the rock asphalt of France, from which its asphalt "pavements are made, is a limestone or a sandstone rock "containing from 15 to 25 per cent. of bitumen, and "that the pavement made of this kind of limestone, when "reduced to fragments and compressed, is a different "thing from the surface asphalt pavement of this "country, which is formed from Trinidad asphalt, con-"sisting to a great extent of bitumen, united with petrol-"eum and heated sand, and is melted by heat. The ap-"plication of heat to rock asphalt causes it to crumble, "and reduces it to sand or powder, which does not firmly "unite or 'bond' with the old material, while a similar "sudden application of violent heat to the surface of a "Trinidad asphalt pavement melts the particles, which, "when commingled with a new mixture, can become "united with the fresh material.

"It is, however, noteworthy that Crochet thought that "the beneficial effect of his process was to soften the sub-"jacent layer of the French pavement so that it should "'unite perfectly with the new layer, and form with it a "thickness, without solution of continuity.' Neverthe-"less, there is, in fact, a difference in material of "the two pavements, and we are inclined to differ from "the Circuit Court, and to regard the Perkins patent as "patentable, because it was an application of an old "process of intense heating, by means of a movable "furnace, to different and dissimilar materials. The two "processes were not exactly alike. Crochet treated the "surface by vivid heat, removed the damaged part, "roughened the remaining surface, and added new ma-"terial. Perkins heated in the same way, reduced the "old material to a soft, pliable state, agitated it with a "rake; and mixed it with enough new material to fill up "the spot to be repaired. No other anticipation of im-"portance was presented in the record.

"The defendant used in Buffalo, for its heating pur-"poses, a coke furnace upon wheels, and its process is "described by Mr. Kent, who carefully watched it for "two months, for the purpose of giving testimony as "follows:

" ' Asbestos sheets were placed on the outside of the " ' edges of the spot to be repaired so as to protect the " ' surrounding pavement from the heat. The complain- " ' ants also use these sheets. "This coke heater was then " ' left over the spot to be repaired a sufficient length of " ' time to soften the asphalt to the depth of half an inch, " ' more or less. The coke heater was then wheeled " ' away, the asbestos removed, and the heated portion " ' of the pavement scraped off to a depth of half an " ' inch, more or less, with notched hoes, and the edge " ' of the portion scraped off was made even and smooth, " ' and then the surface of the patch was sprinkled with " ' asphalt cement, and the edges daubed with the same " ' material. New asphalt was then thrown on, and made " ' level with the surrounding pavement with the back of " ' an iron rake. It was then compressed or tamped " ' with iron tampers or smoothers and rolled with a hot " ' roller." The cement was in very slight quantity, and " ' was sprinkled in narrow threads from a broom. The " ' softened asphalt was generally removed with an iron " ' rake, the action of which on the lower surface left it " ' in a rough or in a sort of grooved state. It was not " ' deemed necessary that the new asphalt should be " ' added at once, while the spot to be repaired was hot, " ' though that was the rule. There was no agitation or " ' raking of the bottom when the new material was " ' added, which was thrown in with a shovel and " ' smoothed off or made level.'

" The question is whether this process is that of the " patent. If claim 1 is to be literally construed, it is " void, for it is simply for the application of heat for a " purpose, and of a character and amount, not expressed, " the addition of new material, and the usual smoothing " and burnishing; but no contention is made that it is " not to be construed for the process substantially as de- " scribed—that is, that the old material shall be heated " until it is softened or partially melted, shall be agitated, " and that the new material is to be mixed with, and be- " come a part of, the old material. The claim could " hardly be construed to permit the omission of any of " the described steps of the process, unless such omission " had been recognized in the specification. Claims 1 and " 2 do not, therefore, materially differ from each other.

"The patented process omits the use of tar as a solder, "and does not look to the use of any material for that "purpose. The defendant, after the burned or crusted "portion of the surface had been scraped off, sprinkled "the hole with asphalt cement. The sprinkling, though "the amount of the cement which was applied was very "small, was for the purpose of causing the new material "to adhere to the old. It was for a solder, and not for "the purpose of fusion. The sprinkling shows the exist- "ence of another variance between the two processes "which is substantial. In the Perkins process the old "and melted material is used. It is agitated so as to be- "come thoroughly plastic, is mixed with the new ma- "terial and the two become homogeneous. In the de- "fendant's process the hole is scraped, the softened "asphalt is removed with a rake, which leaves the lower "surface in a rough state, 'the surface of the patch is "sprinkled with asphalt cement,' which shows that the "old material had practically disappeared, and new "asphalt is shoveled into the hole and tamped down. "The Perkins process places stress upon the perfect com- "mingling of old and new asphalt as a result of the agita- "tion of the particles of old and new material. The "defendant's process places no reliance upon this kind of "commingling, but scrapes or cleans out the depression, "sprinkles a little cement upon the bottom and edges, to "be of some benefit in causing the old and new to adhere, "and shovels in and tamps down the new material. "Wherein the defendant's process differs from that of "Perkins it corresponds with that of Crochet. The de- "cree of the Circuit Court is affirmed with costs."